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Human Rights Committee

Concluding observations on the seventh periodic report of Poland

Addendum

Information received from Poland on follow-up to the concluding observations*

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Response to recommendations no. 8, 24 and 32

Recommendation 8

1. The Polish Constitutional Tribunal operates and examines the cases it receives, while the implemented changes have not undermined its independence in any way. The adopted statutes on the Constitutional Tribunal pursue the disposition mentioned in Art. 197 of the Constitution of the Republic of Poland, i.e. "The organization of the Constitutional Tribunal and the mode of proceeding before the Tribunal shall be determined by statute". The proposed regulations do not exceed beyond the framework established by the aforementioned provision of the Basic Law. The principles for the operation of the Constitutional Tribunal have been regulated by the statutes in a clear and precise way. The justifications to the adopted statutes contain, inter alia, information about the reasons for which the legislative works have been undertaken, as well as about the expected positive effects the statutes should bring. There have been no obstacles which could hinder the Constitutional Tribunal from performing its duties. The legal acts initiated and adopted by the Parliament in late 2016 are consistent with the European standards for the operation of a constitutional court. The statutes regulate the system-based and functional matters concerning the Constitutional Tribunal, while taking into account a number of recommendations issued by the Venice Commission.

Recommendation 24

Abortion procedures

2. In accordance with Art. 4a (1) of the Act of 7 January 1993 on the family planning, protection of the human foetus and the conditions for permissibility of abortion, an abortion may be carried out exclusively by a medical practitioner, in case:

(a) the pregnancy poses a threat to the life or health of the pregnant woman;

(b) the prenatal examinations or other medical premises indicate a high probability that the foetus is severely or irreversibly impaired or suffers from an incurable disease which poses a threat to its life;

(c) there is a justified suspicion that the pregnancy has been caused as a result of an illegal act.

3. The existence of the conditions mentioned in points 1 and 2 is established by a medical practitioner other than the one carrying out the abortion, unless the pregnancy poses a direct threat to the life of the woman, whereby the condition mentioned in point 3 is established by the prosecutor. The abortion requires a written consent of the woman. As far as minor or totally incapacitated women are concerned, the written consent must be granted by their statutory representative. Minor girls aged 13 years or more must also grant their consent in writing. Minor girls aged up to 13 years have the right to express their opinion, but the consent must be granted by the guardianship court. As far as totally incapacitated women are concerned, they must also grant their consent, unless this is impossible due to their mental health. Should the statutory representative not grant the consent, the abortion may be carried out upon the consent of the guardianship court.

4. Should the prenatal examinations or other medical premises indicate a high probability that the foetus is severely or irreversibly impaired or suffers from an incurable disease which poses a threat to its life, the abortion may be carried out until the foetus has reached the capacity to live independently outside of the organism of the pregnant woman. Should there be a justified suspicion that the pregnancy has been caused as a result of an illegal act, the abortion may be carried out up to the end of the 12th week of pregnancy.

5. In accordance with Art. 4b of the Act of 7 January 1993 on the family planning, protection of the human foetus and the conditions for permissibility of abortion, "persons subject to social insurance and persons eligible to free health care under separate provisions shall have the right to have a free abortion carried out in medical facilities". Annex No. 1 to

the Regulation of the Minister of 22 November 2013 on the guaranteed services of hospital treatment contains a schedule of the guaranteed services related to abortion.

6. The Regulation of the Minister of Health and Social Care of 22 January 1997 on the professional qualifications of medical practitioners which allow to carry out abortions and to establish that the pregnancy poses a threat to the life or health of the woman or indicates a high probability that the foetus is severely and irreversibly impaired or suffers from an incurable disease which poses a threat to its life provides that an abortion may be carried out by a medical practitioner who has obtained the first degree of specialization in gynaecology and obstetrics or is a specialist in gynaecology and obstetrics. Furthermore, the occurrence of the circumstances indicating that the pregnancy poses a threat to the life or health of the pregnant woman is established by a medical practitioner who is a specialist in the field of medicine relevant for the disease the pregnant woman suffers from.

Statistics on illegal abortions

7. The data on the number of abortions carried out in Poland are collected on the basis of reports which are prepared under the performance of the Statistical Research Programme of Public Statistics for a particular year. For objective reasons, i.e. due to the non-legal nature of the phenomenon, the data collected in this way dot not take into consideration the number of illegal abortions. The phenomenon is difficult to investigate. It is partially reflected by the results of the actions carried out by the prosecution authorities and by the judiciary. However, it should be noted that the actions consist of conducting and supervising preliminary proceedings concerning illegal acts defined in the provisions of the Act of 6 June 1997 — the Criminal Code, inter alia, those in which the life and health of the child is protected during the prenatal period, from conception and directly after birth.

8. As emphasized, the results of the actions carried out by the prosecution authorities and by the judiciary illustrate the phenomenon of abortions which are carried out in violation of the law only on a random basis, as the respective data refer exclusively to the cases which are subject to the actions of the organizational units of the prosecutor's office. Nevertheless, there are no other official data.

Application of the "conscience clause"

9. In accordance with Art. 39 of the Act of 5 December 1996 on the profession of medical practitioner and of dental practitioner, medical practitioners may refrain from performing health services which are contrary to their conscience, subject to Art. 30 (to the extent the medical practitioner is obliged to provide medical aid in any case a delay could expose to danger of loss of life or grievous bodily injury or grievous disorder of health). The medical practitioner is obliged to register and justify the fact in the medical records. Furthermore, those medical practitioners who pursue their profession under an employment or service relationship are obliged to inform first their supervisors in writing. As specified in Art. 14 of the Act of 15 April 2011 on the medical activities, the entity carrying out a medical activity makes public the information on the scope and type of health services it performs. At the request of patients, the entity carrying out a medical activity additionally provides detailed information on the health services it performs, in particular the information on the diagnostic or therapeutic methods in use and on the quality and security of the methods.

10. Furthermore, it should be pointed out that in the light of the valid provisions, in particular the provisions of the Regulation of the Minister of Health of 8 September 2015 on the general contractual conditions for performing health services, all medical entities (hospitals) which have concluded a contract with the National Health Fund are obliged to perform the services specified therein — completely and lawfully. By signing the contract for performing health services, the service provider undertakes to perform all the services which are specified as guaranteed in the respective implementing regulations to the statute, according to the scope and type of services the contract has been concluded for. It should be pointed out at the same time that the Regulation of the Minister of Health of 22 November 2013 on the guaranteed services of hospital treatment covers services related to abortion.

Objections to the medical opinion or report

11. The right of the patient to raise objections to the medical opinion or report is an effective means of legal protection, inter alia, for those women who have been refused the procedure of abortion (under the circumstances foreseen in the Act of 7 January 1993 on the family planning, protection of the human foetus and the conditions for permissibility of abortion).

12. The mentioned right was introduced to the Polish legal system by the Act of 6 November 2008 on the patient's rights and on the Commissioner for Patients' Rights. The right is granted to the patient or to a statutory representative acting in the name of the patient. In accordance with the aforementioned statute, objections to the medical opinion or report issued by a medical practitioner or by a dental practitioner may be raised to the Medical Committee by the Commissioner for Patients' Rights if the medical opinion or report has an impact on the rights or duties of the patient in accordance with the law. The Medical Committee by the Commissioner for Patients' Rights carries out its activities on the basis of the Regulation of the Minister of Health of 10 March 2010 on the Medical Committee by the Commissioner for Patients' Rights.

13. In accordance with Art. 32(2) of the Act of 6 November 2008 on the patient's rights and on the Commissioner for Patients' Rights, national consultants, in agreement with competent voivodeship consultants, prepare lists of medical practitioners who may become members of the Medical Committee until 30 March of each year. The Commissioner for Patients' Rights requested the national consultants in individual fields of medicine to actualise the lists they had prepared and submitted.

14. The right to raise objections to the medical opinion or report was introduced to the Polish legal system in order to implement the judgment of the European Court of Human Rights in the case of *Tysiąc v. Poland*, as well as to implement the judgment in the case of *R.R. v. Poland* and in the case of *P. and S. v. Poland*. It should be emphasized at the same time that the mechanism of objection in its current form is without detriment to the specifics and deadlines related to abortion.

15. Apart from the aforementioned right to raise objections, it should be pointed out that the Commissioner for Patients' Rights was appointed by the Act of 6 November 2008 on the patient's rights and on the Commissioner for Patients' Rights in order to protect the patients' rights.

16. The Commissioner for Patients' Rights is competent to, inter alia:

(a) conduct proceedings concerning practices which violate collective rights of patients;

(b) conduct explanatory proceedings if the Commissioner may suspect at least that the rights of the patient have been violated;

(c) perform the duties specified in Art. 55 of the statute in civil cases;

(d) cooperate with any bodies of the public authorities to ensure that the rights of the patients are followed, in particular with the minister competent for health matters;

(e) submit to the competent bodies of the public authorities, organizations and institutions and self-governments of medical practitioners evaluations and requests to ensure that the rights of the patient are protected effectively;

(f) cooperate with non-governmental, social and professional organizations the statutory objective of which is to protect the rights of the patient;

(g) analyse complaints of the patients to determine threats and areas in the health protection system which must be corrected.

17. Furthermore, the Commissioner for Patients' Rights — in response to written requests, e-mail notices, as well as following personal visits of patients to the Office of the Commissioner for Patients' Rights — provides information on the widely understood issue of pregnant women.

18. It should therefore be pointed out that the pregnant woman who has been refused the service she is eligible to receive has the right to refer to the Commissioner for Patients' Rights who — provided that the received information makes it at least probable that the rights of the patient have been violated — institutes an explanatory proceeding in this case. All patients may contact the Office of the Commissioner for Patients' Rights by using the all-Poland Helpline 800 190 590 free of charge. The employees on duty provide information about the available rights on an ongoing basis, about what should be done in a particular situation and indicate the available legal means. The Helpline operates between 9 a.m. and 9 p.m. Monday to Friday, which makes it possible to contact the Office also in the afternoon and in the evening.

19. The patient who has been refused the procedure of abortion may — apart from raising objections to the medical opinion or report — enforce her right in this mode.

Accessibility of prenatal examinations

20. In accordance with Art. 2 (2a) of the Act of 7 January 1993 on the family planning, protection of the human foetus and the conditions for permissibility of abortion, bodies of the governmental and self-governmental administration are obliged, under their competences determined in specific provisions, to ensure a free access to information and prenatal examinations, in particular in case there is a higher risk or suspicion that the foetus may have a genetic or development defect or may suffer from an incurable disease which poses a threat to its life.

21. The accessibility of the prenatal examinations is regulated, inter alia, by the Regulation of the Minister of Health of 6 November 2013 on the guaranteed services under health programmes. The list of the guaranteed services under preventive health programmes and of their conditions, annexed to the aforementioned regulation, contains the programme of prenatal examinations. The programme contains a detailed scope of the procedures which are performed under the guaranteed service, the qualification criteria of the programme for the recipient and the qualification criteria for the service provider. As far as the qualification criteria of the programme for the recipient are concerned, the pregnant woman must fulfil at least one of the following criteria:

(a) be at the age of more than 35 years (the examination is granted to the woman starting from the calendar year in which she has reached the age of 35 years);

(b) chromosome aberration of the foetus or of the child has occurred during the former pregnancy;

(c) structural chromosome aberrations have been established by the pregnant woman or by the child's father;

(d) it has been established that there is a higher risk that the child will be born with a mono-genetically conditioned or multi-factor disease;

(e) an incorrect result of the ultrasonography or of the biochemical tests has been established during the pregnancy which indicates an increased risk of chromosome aberration or of a defect of the foetus.

22. To be included in the programme, it is required to provide a referral from the medical practitioner who manages the pregnancy, including the information on the indications to be included in the programme and the description of the irregularities and the attached results of the examinations to confirm the justified referral to the programme.

23. The programme covers the following procedures:

(a) advisory and biochemical tests:

- Oestriol;
- Alpha-Fetoprotein (AFP);
- human chorionic gonadotropin — beta (β-HCG);
- pregnancy-associated plasma protein A (PAPP-A), including the computer evaluation of the risk that the foetus may suffer from a disease;

(b) advisory and ultrasonography of the foetus to diagnose birth defects;

(c) genetic advisory and tests:

- classical cytogenetic tests (staining techniques — GTG, CBG, Ag-NOR, QFQ, RBG stains and high-resolution HRBT with the microscope analysis of chromosomes);
- cytogenetic molecular examinations (FISH test — fluorescent in-situ hybridization test — for metaphase and prometaphase chromosomes and interphase nuclei with molecular and centromere probes, painting, specific and telomeric probes, and Multicolor-FISH);
- examinations with the use of molecular biology techniques (PCR and its modifications, RFLP, SSCP, HD, sequencing, etc.), selected depending on the size and type of mutation;

(d) taking foetus material for genetic tests (amniocentesis, trophoblast biopsy, or percutaneous umbilical cord blood sampling).

24. It should be pointed out at the same time that the prenatal examinations are preventive and diagnostic examinations above all else, and the fact that they are performed should not be considered equivalent only to the establishment of any circumstances which allow to carry out an abortion. It is incorrect to assume that the only objective of the aforementioned examinations is to carry out an abortion in each case — on the basis of their results. The prenatal examinations are aimed at identifying or excluding a defect or disease of the child. Modern medicine makes it possible to cure certain development defects as early as during the pregnancy, while other defects may be cured directly after the child's birth. If the development anomalies are detected early enough, it is possible to prepare better for the birth of the child require specific care due to its health problems. The matter is of paramount importance not only for the medical practitioner who can plan an effective form of treatment, but also for the child's parents.

25. As commented above, the admissibility of abortion was regulated by the Act of 7 January 1993 on the family planning, protection of the human foetus and the conditions for permissibility of abortion.

Recommendation 32

26. It should be emphasized that both the Act of 13 June 2003 on the granting of protection to foreigners in the territory of the Republic of Poland, which regulates in particular the matters concerning the persons applying for international protection, and the Act of 12 December 2013 on foreigners, which regulates the matters concerning foreigners, including the illegal migrants, provide alternative measures to detention, i.e. 1) reporting to a competent body of the Border Guard at certain intervals, 2) paying in a monetary guarantee, 3) depositing passport (the obligation must be fulfilled by all those applying for protection, as mentioned in Art. 13 (2) (b) of the procedural directive), 4) living in the indicated place. The specific construction of the provisions of both aforementioned states obliges the Border Guarder to examine in each case if alternative measures should be used before a request is filed with the court for placing a foreigner in a guarded facility. Should the Border Guard not use any alternative measures and should the Border Guard file a request with the court, the matter related to placing a foreigner in a guarded facility is evaluated again by the court which may issue a ruling on the use of alternative measures. Thus, those applying for international protection and illegal migrants are placed in guarded facilities only in justified situations.

27. It should be concluded that the alternative measures are used against foreigners more and more effectively. In 2015, 1026 alternative measures were used, while there were 2317 measures used in 2016.

28. Furthermore, it should be emphasized that both of the aforementioned statutes secure the interests of foreigners staying in a guarded facility, while regulating precisely the release from such facilities: 1) unconditionally (inter alia upon the lapse of the period of stay mentioned in the court ruling, upon the lapse of the deadline for transferring a

foreigner in the mode of the Dublin III Regulation, and upon the delivery of the decision which gives the right to international or humanitarian protection or upon the delivery of the decision about repealing the decision ordering the return), and 2) upon the issue of the decision to release the foreigner. It should be emphasized in this respect that such decisions are issued, inter alia, in case it has been established that it is not possible to implement the decision ordering the return for legal or factual reasons. Additionally, it is worth pointing out that the body of the Border Guard in charge of the facility is competent to decide on whether a foreigner may be released from the guarded facility. Such a solution makes it possible to shorten the period of stay in the guarded facility by the time which would be necessary to file an appropriate request with the court and for the court to examine it.

29. The fact that the legal system functions well in this respect is also reflected by the figures, i.e. the average period of stay (both under and outside of the refugee procedure) amounted to 70.96 days in 2016, if compared with 74.63 days in 2015.

30. With regard to the supervision over the lawfulness and correctness of the foreigners' staying in guarded facilities for foreigners, it should be pointed out that it is exercised by penitentiary judges of the district courts competent for the location of the respective guarded facility. The supervision consists of the control and evaluation of the legal basis in particular, as well as of the housing conditions for foreigners, health care and of the respect for the rights of those who are placed in the facilities. The protocols on the visits to the guarded facilities, which are submitted to the Headquarters of the Border Guard, do not contain any information which may indicate any irregularities. The housing conditions for foreigners in the guarded facilities are also monitored both by the National Preventive Mechanism and by non-governmental organizations.

Ref. 32.b

31. It should be pointed out that the valid provisions allow to place unaccompanied minors in care and educational facilities or in foster families on the basis of a court ruling, or in guarded centres for foreigners in case they have reached the age of 15 years and have not submitted a request for granting international protection.

32. However, minors accompanied by their statutory representatives (parents) may be placed in specially profiled and guarded facilities. However, it should be emphasized that by adjudicating on the placing of foreigners in a guarded facility the court is obliged to take into account the best interest of the child in each case.

33. Taking into consideration the necessity to ensure optimal housing conditions for the minors staying in guarded facilities for foreigners, in early 2013 the Border Guarded decided to profile the guarded facilities. The performed analysis of the existing housing conditions and of the possible cooperation with schools was used to select only two facilities out of all six guarded facilities for placing school-aged children therein. As a result of the solution, families with school-aged children are accepted only to a guarded facility in Kętrzyn or in Biała Podlaska, while unaccompanied minors are accepted only to a guarded facility in Kętrzyn. Families with children other than school-aged children may be placed in a guarded facility in Przemyśl.

34. The infrastructure of the guarded facilities for foreigners, which have a family profile, has been adjusted to the needs of minors. The facility has, inter alia, rooms which may also be used by minors. There are, inter alia, a room for cultural and sport classes, a teaching room, a fitness room, a gym, a billiard room, and a library. The rooms are equipped with the devices which make it possible to conduct classes with children (including the youngest ones, e.g. small tables and chairs, art and technical instruments for the youngest) and make the leisure time more attractive. It should also be pointed out that the surroundings of the facility have been adjusted to the needs of minors — there are fields for team sports and playgrounds in the walking area. Outdoor gyms are also available for older children.

35. Families placed in a guarded facility receive a separate living room (the size of the room is adjusted to the number of persons). Foreigners are allowed to move freely on the whole premises of the guarded facility, including all the public rooms, as well as to use the walking area. The aforementioned activity is limited only by meal breaks and quiet hours.

36. Minor foreigners staying in the aforementioned facilities (in Kętrzyn and in Biała Podlaska) have access to education. The school obligation is implemented by specialist teachers under the cooperation between the respective facility and a school. Teachers conduct classes in the building of the facility. Education is provided on the primary, lower-secondary and upper-secondary level. Minors staying in the guarded facilities have the right to join both the teaching and educational and leisure and sports classes. The programme is adjusted to the age of the minor and the length of his or her stay in the territory of the Republic of Poland on an individual basis.

37. Furthermore, the structures of the guarded facilities for foreigners include teaching and educational teams which are in charge of, inter alia, organizing and conducting cultural and educational classes and compensatory courses for those children in need. The teams perform their duties, inter alia, in the form of language classes for children and adults, art classes, educational classes (to improve manual skills, visual functions and logical thinking, mathematical skills, as well as skills to study the map of Poland and of Europe), sports classes for children and adults, as well as integration classes for minor and adult foreigners.

38. Foreigners staying in the guarded facilities, including the minors, have access to medical care. During their stay, foreigners have the right to medical services, including those offered outside of the guarded facility, and in hospitals, if required. Each foreigner is examined after being accepted to the facility, afterwards at least every three months and before the release. Furthermore, they receive medical services and medications, if necessary. The Public Health Care Centres or external service providers, with which civil law contracts are signed, are responsible for the quality and organization of the medical services for foreigners in the guarded facilities.

39. After accepting a foreigner, including a minor one, to a guarded facility, employees of the educational and teaching team of the facility interview him or her in order to establish the physical and mental condition. Health cards are arranged for the foreigner. Each medical examination ends by completing the medical records kept by the medical staff. Minor foreigners (depending on their age) are also subject to obligatory vaccinations, which are performed according to the schedule recommended by the Ministry of Health (children have vaccination cards).

40. It should also be pointed out that the Border Guard has implemented an algorithm of proceeding with those foreigners who require specific care. The algorithm determines the objective, mode, subject matter and the rules of proceeding for officers of the Border Guard in case a person with specific needs is identified. The category also covers minors. The algorithm is aimed at creating optimal conditions which guarantee not only the care by the medical staff and by the psychologists, but also continuous supervision and support in the form of a specialist team appointed to identify persons with specific needs as early as possible, consultations by specialist medical practitioners, the possibility to treat addictions and seek help of psychologists and psychotherapists. The algorithm also introduced an obligation to appoint a social guardian for each foreigner (competent in the matters of direct contact with the foreigner, observation of his or her behaviour, and providing psychologist and medical care) and a return guardian (competent in the matters related to the state of the administrative procedures).

41. Furthermore, while taking into account the good of the minors staying in the guarded facilities, cooperation was started with the Empowering Children Foundation in May 2017 in order to prevent and counteract the harming of foreign children staying in the guarded facilities for foreigners. The project in progress will be aimed at preparing the "Policy for protecting children against harm" as an algorithm of proceeding in case it has been established that a child is harmed in a guarded facility for foreigners, as well as at conducting appropriate trainings and workshops for the staff, including the medical one, on how to use the algorithm.

Ref. 32.c

42. Being a border formation, the Border Guard is obliged to counteract illegal migration, but it is also the only competent body to accept requests for international protection from foreigners. The body of the Border Guard is obliged to submit such

requests to the Head of the Office for Foreigners within 48 hours, i.e. the body competent to carry out proceedings concerning the granting of international protection.

43. It should be emphasized that persons seeking international protection are identified during the border control. The border control involves complex subsequent actions which are not limited only to the verification of the travel document and visa (as in case of the so called first-line border control). The actions also involve a detailed and individual assessment of whether the conditions of entry are fulfilled during the so called second-line border control, by which the explanations provided by the foreigner during an individual interview with an officer of the Border Guarder are of crucial importance.

44. In order to fully implement the *non-refoulement* principle, the officers of the Border Guard are made sensitive (both through the instructions and trainings) to any symptoms that may indicate that a foreigner seeks international protection — not only to those appearing in the statements illustrating the threats in the country of origin and fears to return thereto, but also to those appearing in the behaviour deviating from the accepted norms (in particular those which may reflect the post-traumatic stress disorder). The implied intent to submit a request for international protection covers the whole of the statements made by the foreigner and his or her behaviour.

45. Should the statements made by the foreigner involve any premises which may indicate that he or she seeks international protection, the officer of the Border Guard is obliged to accept his or her request for international protection. There is no legal or factual possibility to refuse such request and send the person back, as it could result in an irreversible damage.

46. Should it be impossible to identify any elements in the statements made by the foreigner in a direct and independent way, which may reflect his or her fear to return to the country, as mentioned in the Geneva Convention, while the statement by the foreigner reflects only the economic reasons for migration or, for example, those resulting from personal conflicts, the entry is rejected.